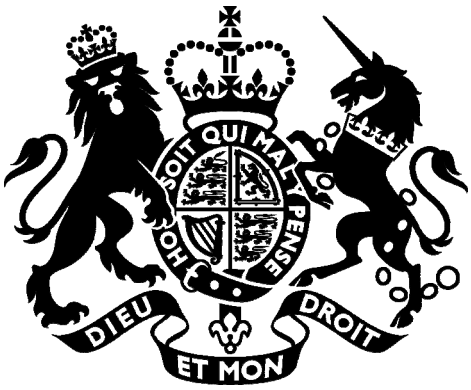
Ministry
of Justice

Judicial Review – proposals for further reform: the Government response

February 2014



Judicial Review – proposals for further reform: the Government response

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Ministerial Foreword

I believe in protecting judicial review as a check on unlawful executive action, but I am equally clear that it should not be abused, to act as a brake on growth. In my view judicial review has extended far beyond its original concept, and too often cases are pursued as a campaigning tool, or simply to delay legitimate proposals. That is bad for the economy and the taxpayer, and also bad for public confidence in the justice system.

The recent consultation 'Judicial Review: proposals for further reform' set out the Government's concerns about the growth in the number of judicial reviews, the motives of some who bring them, and their impact. The consultation attracted 325 responses. Having considered them with care I am satisfied both that there is a compelling case for reform and that it should proceed at pace.

Some of the changes I intend to take forward were detailed in the Autumn Statement and the National Infrastructure Plan, namely the creation of a Planning Court to reduce delays to key projects, allowing nationally significant cases to reach the Supreme Court more swiftly, and amending how the courts deal with judicial reviews brought on minor technicalities.

In addition, I am taking forward a comprehensive package of reform to the financial measures relating to judicial review. I want to ensure that claimants – and those who support and fund claims but sometimes remain hidden in the background – bear a more proportionate degree of financial risk when they decide to pursue a case. In particular, I am setting up a strict framework governing when Protective Costs Orders (in non-environmental cases) can be made. This reflects my belief that only claims which the courts deem to have merit and which are genuinely in the public interest should gain such protection and that, where a Protective Costs Order is granted, the taxpayer must also be protected from excess costs.

I consulted on a proposal to pay legal aid providers for work carried out on application for permission only if permission is granted, to ensure that weak cases no longer receive taxpayer funding. I intend to implement this reform, with some modifications to the discretionary criteria.

To complement our streamlining of planning cases, I will also introduce a permission filter for appeals under section 288 of the Town and County Planning Act 1990 in order to weed out weak claims earlier. I do not, however, intend to remove those cases (or those under section 289 of the same Act) from the scope of legal aid altogether.

Some of these measures may not be popular with those who benefit from the status quo, but I am confident that they support economic growth for our nation's future, promote fairness for the taxpayer, and protect access to justice for all.

Chris Grayling
Lord Chancellor and Secretary of State for Justice

Summary

Introduction and context

1. The consultation *Judicial Review: Proposals for further reform*, to which this document is the Government's response, opened on 6 September 2013 and closed on 1 November 2013. The consultation examined proposals in six areas aimed at reducing the burden imposed by judicial review. In particular the Government was concerned to speed up planning cases and tackle the abuse of judicial review by those seeking to generate publicity or delay implementation of decisions that had been properly and lawfully taken. The present economic climate gives a particular urgency to reform, as the issues the Government is seeking to address are holding back growth.

2. The recent consultation sought to build on reforms to judicial review which were implemented following an earlier consultation.[1] Those reforms:

   - reduced the time limits for bringing a judicial review in planning and procurement cases from three months to six weeks and 30 days respectively;
   - removed the right to an oral reconsideration of a refusal of permission to bring judicial review where the case is assessed by a judge as totally without merit; and
   - introduced a new fee for oral renewal of a permission hearing, initially £215.

3. The first and second of these reforms were implemented on 1 July 2013, the third on 7 October. The Ministry of Justice has recently consulted separately on a move to full cost recovery for judicial review fees.

4. Alongside these reforms, from 1 November 2013 the majority of immigration and asylum judicial reviews transferred from the Administrative Court to the Upper Tribunal. This is expected to significantly reduce the judicial review workload of the Administrative Court and improve efficiency. The effect of the transfer on the Upper Tribunal will need to be monitored during 2014.

5. The reforms implemented last year were an important first step but the Government is of the view, having carefully considered the consultation responses, that more needs to be done.

6. The Government is also clear that its reforms do not detract from the crucial role played by judicial review as a check on the Executive.

Why further reform is needed

7. The latest court statistics published on 19 December 2013 show that there has been a significant growth in the volume of judicial reviews lodged, which by 2012 was nearly three times the volume in 2000 (rising from around 4,300 in 2000 to around 12,600 in 2012). For cases lodged in 2012, around 7,500 were considered for

[1] The consultation *Judicial Review: Proposals for reform* ran from December 2012 until January 2013. The Government response was published in April 2013.

permission and around 1,400 secured permission (including after an oral renewal).[2] The volume of judicial reviews lodged continued to increase during 2013. In the first nine months of 2013, around 12,800 judicial reviews were lodged, exceeding the total of around 12,600 for the whole of 2012.[3]

8. Around 16,000 cases were lodged over the 12 months between 1 October 2012 and 30 September 2013. Around 6,700 (42%) of these 16,000 cases reached the permission or oral renewal stages.[4] Around a third of the cases which reached those stages were found to be totally without merit.[5]

9. 325 responses were received to the recent consultation (summarised at Annexes A and B) including from legal practitioners and their professional bodies (e.g. the Law Society and the Bar Council), charities and NGOs, several of whom had difficulty with much of what was proposed. But there was a body of support for reform, particularly among businesses and public authorities who agreed that there are further improvements to be made to the current system. Other than in respect of certain proposals (see paragraphs 14 and 16) below, the Government believes that the case for reform is strong. Its reasons are set out in detail from paragraph 17 onwards, where each of the original proposals is considered in turn in light of the points made by respondents.

10. Respondents highlighted a number of cases where planning judicial reviews had delayed development projects – increasing costs for developers and delaying the economic benefits, including the creation of new jobs. For example, Southend Airport's expansion was delayed by 65 weeks after planning permission was granted despite permission being refused at every stage of the judicial review appeal, including an oral hearing in the Court of Appeal. Respondents suggested that the cost of this delay to the local economy was £100m per year.

11. The Government's view is that those who bring judicial reviews do not always have – but should have – a proportionate interest in the financial risk of litigation. One example provided related to a planning decision where a group of local residents formed a limited company which brought a judicial review. The company was formed by a small number of directors, each of whom paid £1 to the company funds. By doing this, the respondent argued, the directors aimed to avoid any adverse costs consequences if the challenge was unsuccessful. The potential cost to the taxpayer, in terms of defendant legal costs which might otherwise have been recovered from the losing claimant, could be significant. The respondent also said that other local residents were "horrified" that a small group could hold up a democratically agreed development at such small financial risk to themselves.

12. The Government has taken this opportunity to look again at the use of legal aid in cases of judicial review and considers that limited legal aid resources should be properly targeted at those judicial review cases where they are needed most.

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[2] This figure does not include those cases that withdraw before a permission decision is made.

[3] https://www.gov.uk/government/publications/court-statistics-quarterly-july-to-september-2013

[4] At the time the data was extracted in November 2013.

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267508/csq-q3-jul-sep-2013.pdf

The way forward

13. Overall the Government has concluded that reform is necessary to address the problems it had identified and to help ensure that in future judicial review is used appropriately. This document sets out a package of measures, some of which have already been announced, which are the result of careful consideration of the many consultation responses. On 4 and 5 December 2013 respectively the National Infrastructure Plan and the Chancellor's Autumn Statement set out the Government's intention to proceed with the following reforms:

    - a specialist Planning Court within the High Court to deal with judicial reviews and statutory appeals relating to Nationally Significant Infrastructure Projects and other planning matters;
    - a lower threshold test for when a defect in procedure would have made no difference to the original outcome. The Government will also establish a procedure to allow this to be considered earlier in the case at the permission stage; and
    - allowing appeals to 'leapfrog' directly to the Supreme Court in a wider range of circumstances by expanding the criteria for such appeals, removing the requirement for consent of both parties, and allowing leapfrog appeals to be brought from more courts and tribunals.

14. The Government will also be taking forward a set of reforms to certain financial aspects of judicial review, the aim being to deter claimants from bringing or persisting with weak cases. Accordingly this document details action to be taken in respect of legal aid for judicial review cases, oral permission hearings, Protective Costs Orders, Wasted Costs Orders, interveners' costs and third party funding. The Government considers that these changes are a more effective means of reducing the number of unmeritorious judicial reviews that are either brought or persisted with than changing the test for standing.

15. The Criminal Justice and Courts Bill makes provision for the reforms in relation to procedural defects, the various financial elements of the package, and leapfrogging. Other elements in the overall reform package will be taken forward by means of secondary legislation.

16. Having considered the responses to the consultation, the Government does not intend to make any changes to the scope of legal aid for planning challenges under sections 288 and 289 of the Town and Country Planning Act 1990, or to the ability of local authorities to challenge infrastructure projects.

The Proposals – Planning

Planning Court

17. The consultation proposed establishing a new **Planning Chamber** in the Upper Tribunal, building on the recently established Planning Fast Track (PFT) in the Administrative Court. Details of the PFT and revised time limits were set out at paragraphs 40–44 of the consultation document. The PFT was introduced in July 2013 to reduce delays in challenges to major infrastructure and planning decisions. The PFT uses specialist planning judges to hear cases in line with administrative time limits set down by the President of the Queens Bench Division. Early indications are that the PFT appears to be working well (see below).

18. The Government invited views on further developing the fast track model to create a new Planning Chamber in the tribunal system. Just under a third of respondents expressed a view on the PFT versus a new Planning Chamber. Approximately half of those who commented on planning (mainly members of the judiciary and legal representatives) wanted time to assess the impacts of the first phase of reforms to judicial review and the impact of the PFT before supporting further reform. In particular, the senior judiciary supported keeping the PFT but developing it into a **Planning Court** within the High Court, with a longer term aim of streamlining how planning and environmental cases are dealt with overall.

19. Encouragingly, some respondents had noticed that the PFT is already having an impact. This appears to be borne out by the early data we have received from the Administrative Court with cases which reached permission during October 2013 taking around 7 weeks to get there from being lodged, compared to 21 weeks for the same month in 2012.[6] The Government wishes to build on this promising start.

20. Developers and industry welcomed the proposal to establish a Planning Chamber, though it was clear they welcomed any proposals that would speed up the hearing of planning and major infrastructure cases, in particular through the use of specialist judges, and the development of new procedural rules and set timescales.

21. Having considered carefully the arguments on both sides, the Government has decided to build upon the PFT by establishing a Planning Court in the High Court, as suggested by the senior judiciary, with a separate list under the supervision of a specialist judge. We will also invite the Civil Procedure Rule Committee to include time limits for case progression in the Civil Procedure Rules.

22. The Government is satisfied that the Planning Court continuing to hear cases in the High Court will deliver the improvements it had been minded to seek through the creation of a Planning Chamber in the Upper Tribunal. The Planning Court should be up and running more quickly without introducing uncertainty around the development of new rules and case management procedure that a Planning Chamber in the Upper Tribunal would have required.

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[6] The figures should be treated with caution as they relate to a very small number of cases over a short period of time, and differences in waiting times might reflect differences in case characteristics rather than improvements in court processes. In addition, since the PFT has only been in operation since July, the data relates only to the first part of the court process (from the claim being lodged to a permission decision). Nevertheless, the PFT does appear to be delivering improvements in the pre-permission stages.

Permission filter for section 288 Town and Country Planning Act 1990 challenges

23. Section 288 of the Town and Country Planning Act 1990 provides the only mechanism by which an aggrieved person can challenge certain planning orders, decisions and directions. Challenges may be brought in the High Court on the basis that the order or action concerned was beyond the power conferred by the Act, or that the procedural requirements in relation to the order or action were not complied with.

24. Following suggestions by the judiciary, the Government consulted on whether to include a permission filter for these challenges. This would mean that leave of the court would be required for a challenge to be brought, echoing the approach for judicial reviews and restricting how far weak cases could progress.

25. Of those who responded, the majority were in support, arguing that this would help to reduce the burden of weak challenges. Whilst some respondents raised the risk of the extra stage adding delay, the Government is persuaded that this step will assist by allowing weak challenges to be dealt with more quickly. Scarce resources can then be better focused on stronger cases, also allowing those to be considered more quickly than at present. It will also ensure consistency with the equivalent permission stage for planning judicial reviews.

Local authorities challenging infrastructure projects

26. The major infrastructure planning regime is the process through which Nationally Significant Infrastructure Projects (NSIPs) relating to transport, energy, waste, waste water and water get planning permission and other consents. The major infrastructure regime, contained in the Planning Act 2008, has been in operation since March 2010. Judicial review provides the final opportunity for testing that the legal process has been complied with. The 2008 Act provides for a 6 week time limit for an application for judicial review to be brought.

27. The Government sought views on whether local authorities, who are statutory respondents under the major infrastructure regime, should continue to have standing to challenge permission decisions. Following careful consideration of responses, the Government was persuaded by respondents who noted that, as the consultation set out, there had been no challenges by local authorities to NSIPs since the major infrastructure regime has been in force. Many also argued that, if a local authority does bring a challenge, it will be for the people that the authorities represent to arrive at a view on whether that decision was the right one. The senior judiciary noted that local authorities are already constrained in statute over whether and how they can bring a challenge; and that where local authorities do bring a judicial review it is usually well founded.

28. The Government accepts that in the absence of any challenges to NSIPs by local authorities there may still be arguments about future proofing the 2008 Act regime against challenges in years to come. But it is not convinced that to do so would be beneficial. Developers report that the 2008 Act regime is working well, and that much of that is down to developers and other interested parties, including local authorities, engaging in a constructive way early in the process. Making this change could upset that careful balance. Further, where a claim is brought by a local authority it might be instead of several less well-focused claims by affected individuals and groups, which may actually serve to cause delay. The establishment of a separate Planning Court

will also assist by streamlining the progression of planning judicial reviews through the courts. For these reasons the Government is not minded to make this change.

Funding for challenges to planning decisions under sections 288 and 289 of the Town and Country Planning Act 1990

29. At present, legal aid is not generally available in respect of planning cases or statutory challenges under sections 288 and 289 of the Town and Country Planning Act 1990 other than where an individual is at immediate risk of losing their home as a result of the proceedings in question. In the consultation the Government asked whether legal aid should continue to be available (in scope) in those situations, or whether it should only be available where a failure to fund would result in breach, or a risk of breach, of the legal aid applicant's ECHR or EU rights.

30. Legal Aid Agency data suggests that there were only two legally aided challenges under sections 288 and 289 in the last 3 years, both of which were granted legal aid prior to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 coming into force. This is an area in which some respondents had particular concern over equalities.

31. Given the arguments raised, the Government has decided not to seek to remove legal aid for these challenges at the present time but intends to introduce a permission filter in section 288 statutory appeals (in line with the filter which already exists in section 289 appeals). This will provide a stronger mechanism to prevent weak cases proceeding to a full hearing in future.

The Proposals – Standing

32. The consultation tested whether there was a case to reform standing to bring a judicial review. The present test for standing, set out in section 31 of the Senior Courts Act 1981, requires a claimant to demonstrate a "sufficient interest in the matter to which the application relates". The consultation noted that the test had been applied less restrictively by the courts over time, so that groups and individuals without a direct interest were now more often able to bring judicial reviews in the public interest. The Government had become concerned that this wide approach is vulnerable to misuse by those who wish to use judicial review to seek publicity or otherwise to hinder the process of proper decision-making. The consultation therefore sought views on whether the existing test should be changed.

33. This suggestion was largely opposed, particularly by lawyers and their representative groups and NGOs, who argued that claims brought by groups or organisations without a direct interest in the outcome should continue to be possible. The case for change was challenged, given that there were few such claims brought (as a percentage of total applications) and that Government figures indicate those cases tend to be more successful than on average. Many respondents argued that a change would impact upon meritorious claims which hold the executive to account where it has acted unlawfully and therefore shield the executive from challenge. Additionally, some respondents argued that a direct interest test would alter the purpose of judicial review, moving the focus from challenging public wrong to protecting private rights. The risk of a period of uncertainty and cost while a direct interest test is litigated through the courts was also highlighted and respondents questioned the potential effectiveness of any new test.

34. It was also argued that requiring a direct interest might be counter-productive – causing multiple individuals to bring challenges whereas, under the current test, a single challenge by an expert group would have been brought, with a focus on the key issues.

35. The Government is clear that the current approach to judicial review allows for misuse, but is not of the view that amending standing is the best way to limit the potential for mischief. Rather, the Government's view is that the better way to deliver its policy aim is through a strong package of financial reforms to limit the pursuit of weak claims and by reforming the way the court deals with judicial reviews based on procedural defects.

The Proposals – Procedural Defects

36. At present, the court may refuse to grant permission or award a final remedy on the basis that it is inevitable that a complained of failure would not have made a difference to the original outcome. 'Inevitable' is a high threshold to meet, and the court rarely examines no difference arguments at the permission stage. The consultation sought views on changing the existing approach so the court should refuse permission or a remedy in a case where the alleged failure was 'highly unlikely' to have made a difference – in other words, lowering the threshold.

37. Some respondents, particularly legal practitioners and their representative groups, had concerns about these proposals. The risk of dress rehearsals at permission was noted. (By this, respondents meant that the change would require a fuller examination of the facts and might turn permission hearings into full considerations of the entire case, adding delay.) Few however made suggestions on how to mitigate that risk. A number of respondents thought that amending the test would see valid claims and substantive illegality not ventilated or remedied and would encourage public authorities to behave unlawfully, with potential implications for claimants' confidence in the effectiveness of judicial review. There were also concerns that the court would stray beyond the present focus of judicial review, which concerns the lawfulness of the procedure, to consider the merits of the original decision.

38. The Government's view is that, in a case where the defect complained of is highly unlikely to have made a difference, any remedy the court awards will also be unlikely to make any substantive difference to the outcome. Therefore, the Government's position is that judicial reviews based on failures highly unlikely to have made a difference are not a good use of court time and money. The Government is satisfied that the risk of dress rehearsals is manageable, and that the new test is a reasonable one, given that where there is anything more than minor doubt as to whether there would have been a difference the courts would still be able to grant permission or a remedy.

The Proposals – Public Sector Equality Duty and Judicial Review

39. The Public Sector Equality Duty (PSED) requires public authorities to pay due regard to its three limbs when performing their public functions.[7] If it is felt that a public authority has failed to comply with the legal duty this can form a ground for bringing a judicial review. The consultation sought views on whether there were any alternative mechanisms for resolving disputes relating to the PSED that would be quicker and more cost-effective than judicial review. This follows a recommendation by the Independent Steering Group tasked with reviewing the operation of the PSED to look at this issue.[8]

40. The Government Equalities Office, which is responsible for equality strategy and legislation across Government, is considering the results of the consultation (see summary at Annex A) as part of its work to implement the recommendations of the Independent Steering Group.

The Proposals – Financial Incentives

41. The Government intends to bring forward a tough package of reform to financial provisions in respect of judicial review to deter weak claims from being brought or pursued. It is right that those who bring weak claims face a more appropriate measure of financial risk as their action places pressure on the taxpayer-funded courts and potentially delays important projects and policies.

Legal Aid – paying for permission work in judicial review cases

42. The purpose of the proposal is to ensure that limited legal aid resources are properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility. The Government proposed that providers should only be paid for work carried out on application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission to the Court of Appeal) where permission is granted. Following responses to the Transforming Legal Aid consultation, the Government also proposed permitting the Legal Aid Agency to pay providers in certain cases which conclude prior to a permission decision. The purpose of this revision to the original proposal was to enable payment in meritorious cases which settle prior to a permission and in which it is not possible to obtain costs from the defendant.

43. Some respondents recognised that the Government had modified the original proposal by proposing to allow the LAA to pay providers in certain cases which conclude prior to a permission decision, thereby seeking to address some of the concerns expressed about the original proposal. However, in general respondents remained opposed to this proposal, in particular arguing that the uncertainty and financial risk for providers would impact on the number of providers willing to carry out public law work and the kinds of cases they would be willing to take on in future.

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[7] Equality Act 2010; the three limbs are: eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Act; advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and foster good relations between different groups. The protected characteristics are race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

[8] https://www.gov.uk/government/publications/the-independent-steering-groups-report-of-the-public-sector-equality-duty-psed-review-and-government-response

44. A number of respondents were also concerned about the proposed discretionary payment mechanism, arguing that it would not address the risk they would face at the point of issue and would involve an additional burden for providers in making their application to the LAA. It was suggested that the proposed exhaustive list of criteria was too narrow, and did not take account of factors which might weaken the case after issue, placed too much weight on the claimant's conduct in the proceedings (rather than the defendant's) and would allow defendant public bodies to influence a provider's payment by arguing that the reasons for settlement were unrelated to the claim.

45. The Government remains of the view that the taxpayer should not be paying for a significant number of weak judicial review cases which issue but are not granted permission by the court. The Government considers that it is appropriate for the financial risk of the permission application to rest with the provider and to use the permission test as the threshold for payment. Under the proposals, cases which proceed beyond the permission stage will continue to be paid, regardless of the eventual outcome, and providers will continue to be paid for pre-permission work, whether or not the case is granted permission. The Government therefore intends to implement this proposal.

46. That said, having taken account of the responses to both consultations, the Government will enable the Legal Aid Agency to pay in meritorious cases which conclude prior to a permission decision and, in light of the comments made, will adjust the criteria – or factors – which will be in legislation and which the Legal Aid Agency will apply. The proposed adjustments, set out in full in Annex B, will reduce to a degree the risk that providers will be expected to take and will enable them to continue to be paid in cases which were meritorious at issue but which conclude prior to the permission decision.

Costs at oral permission hearings

47. A person seeking to bring a judicial review requires permission from the court to proceed. If that permission is refused on their paper application they are able to request that the decision is reconsidered at an oral hearing. At present, where the claimant is refused permission at that hearing, a successful defendant's costs of being represented will only be awarded against the unsuccessful claimant in exceptional circumstances. The consultation sought views on introducing a principle that the costs of an oral permission hearing should usually be recoverable and that it should be possible for an unsuccessful claimant to be ordered to pay the defendant's reasonable costs of defending the unsuccessful application. The Government intends to revise these rules so that such awards are routine, but this will still be subject to the court's general discretion on costs.

48. Some respondents raised concerns with the proposal, including that there is a risk of renewals becoming dress rehearsals to any substantive hearing. The Government recognises that it is not desirable to turn permission hearings into dress rehearsals but considers that this can be managed, as now, by the court through its case management powers. It was also argued that the proposal would price claimants out of bringing a claim by increasing the potential costs if unsuccessful. The Government recognises that it is important that meritorious cases are not discontinued solely due to the cost of litigation, but considers that claimants should consider more carefully the potential costs involved when deciding to renew an application already refused by a court.

49. Some respondents argued that the purpose of the oral permission hearing is for the claimant to prove his or her case and the defendant is not required to attend, so if the defendant chooses to do so they should bear their own costs. Having carefully considered the responses the Government believes the measure is justified; whilst it is indeed the defendant's choice (unless ordered to attend by the court) to be represented at an oral permission hearing, equally it is the claimant's choice to pursue the oral permission hearing having been refused on the papers.

50. Where an oral permission hearing is successful costs will not be awarded against a party at that stage but will fall to be determined at the end of the substantive hearing. The courts will still have a general discretion in this area, to ensure justice is done. The Government will invite the Civil Procedure Rule Committee to introduce a principle in the Civil Procedure Rules that the costs of an oral permission hearing should usually be recoverable.

Wasted Costs Orders (WCOs)

51. Where a court makes a WCO it has the effect of making a legal representative personally liable for some of the costs of litigation which they have caused unnecessarily by their improper, unreasonable or negligent behaviour, and which it is unreasonable to expect the litigant to meet. But WCOs are only issued rarely – between March 2011 and June 2013 only around 50 such orders were made – and the Government wished to test in the consultation whether they could be used more effectively.

52. Many respondents felt that the current test for WCOs is appropriate and that there was an insufficient case for change. Some were concerned that the suggestion of a broader test failed to recognise that it is ultimately the client's decision whether or not to bring a case. There were also concerns about the practicalities of deciding whether to award a WCO, in particular advice covered by legal professional privilege which the court would be unable to consider without the client's consent.

53. At present, the Government is content that the best way to improve WCOs' effectiveness is not to amend the existing test, but instead to strengthen the implications for the legal representative where one is made. In many situations where a WCO is awarded, professional negligence will be at issue and, as many respondents pointed out, independent regulatory bodies should have a role in these situations. This should help encourage legal representatives to consider more carefully the decisions they make in handling a case.

54. Whilst a WCO is a serious matter, there are currently no formal regulatory or contractual consequences for the legal representative who has acted improperly, unreasonably or negligently. The Government intends to place a duty on the courts in legislation to consider notifying the relevant regulator and, where appropriate, the Legal Aid Agency, when a WCO is made. This duty will apply in respect of all civil cases, not only judicial reviews.

Protective Costs Orders (PCOs) (non-environmental cases[9])

55. PCOs protect the unsuccessful claimant – and sometimes a defendant – against some or all of the other side's costs. Developed by the courts, PCOs were originally intended to be exceptional (although this is no longer an explicit requirement) and have the effect of shielding the claimant from some or all of the financial consequences of their decisions. The consultation sought views on removing the availability of PCOs where there is an individual or private interest, on modifying the principles for determining when PCOs may be made and on whether there should be a presumption of a cross cap (limiting, generally at a higher level than the claimant's cap) an unsuccessful defendant's liability for the claimant's costs.

56. Some respondents raised concerns with these proposals, including removing the ability to award a PCO where there was a private interest, since (they argued) judicial review is about public wrongs and the proposed reform would leave NGOs and similar groups unable to challenge public interest cases as the potential costs were prohibitive. The point was made that the courts are experienced in balancing private and public rights. Respondents also focused on the small numbers of PCOs made in non-environmental cases. In relation to a cross cap for the defendant's liability there were mixed views, with some respondents arguing that fixed amounts of caps would be unduly restrictive.

57. The Government recognises that some PCOs will undoubtedly be made in cases where there is a strong public interest in resolving an issue, therefore it does not intend to remove the availability of PCOs entirely in non-environmental cases. The Government does, however, wish to make sure that in future PCOs are reserved for cases where there are serious issues of the highest public interest in cases granted permission and which otherwise would not be able to be taken forward without a PCO. It is only in those cases that the Government, regardless of whether it wins or loses, should have to meet its own costs and the costs of the claimants, thus carrying virtually all of the costs of the litigation. The Government is also persuaded that it is right to ensure that where a PCO is granted to a claimant, the court also caps the defendant's costs, ensuring that the taxpayer has cost protection to ensure that costs overall remain within reasonable limits.

58. Therefore the Government will introduce primary legislation to set out the framework for PCOs, and in particular intends to ensure that a strict approach is taken to deciding whether it is in the 'public interest' that the issues in the claim are resolved; that only cases with merit should benefit so that PCOs should only be available once permission to proceed to judicial review has been granted by the court; and that, where a PCO is granted, there should be a presumption that the court will also include in the order a cross-cap on the defendant's liability for the claimant's costs. In addition, the Government will firmly re-establish the principle that a PCO should only be granted where the claimant would otherwise discontinue the claim, and would be acting reasonably in doing so.

59. Although the consultation did not suggest any change to PCOs in environmental cases which fall under the Aarhus Convention and the Public Participation Directive,

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[9] A different cost protection regime applies in judicial reviews concerning environmental matters within the scope of the Aarhus Convention and the Public Participation Directive and is set out in the Civil Procedure Rules. In these cases a claimant's costs are capped at £5,000 where the claimant is an individual and at £10,000 in other cases, and at £35,000 for the defendant.

some respondents supported a more restrictive approach to costs protection in environmental cases. The Government is awaiting the outcome of proceedings before the European Court of Justice but, once the outcome is known, intends to examine whether the approach to PCOs in environmental cases should be further reviewed.

Interveners

60. The consultation looked at whether the provision for the award of costs against parties who choose to intervene in proceedings could be strengthened so that they would bear both their own costs and those of the parties which result from their intervention.

61. Some respondents indicated that interveners do already generally bear their own costs and there was limited support for making them bear other parties' costs. Concerns were raised over whether this would prevent interveners from being involved in cases, the point being made that this could be to the detriment of the final outcome of the case as interveners bring expertise from which the court and parties will benefit.

62. The Government agrees that interveners can add value, supporting the court to establish context and facts. Indeed, the Government will on occasion intervene itself. However, the Government still considers that those who choose to become involved in litigation should have a more proportionate financial interest in the outcome and this should extend to interveners. The Government does not intend to apply these reforms to a party who is requested to intervene by the court, rather these reforms are intended to apply to those who choose to make an application to the court to intervene. The Government will therefore take forward reform, through primary legislation, to introduce a presumption that interveners will bear their own costs and those costs arising to the parties from their intervention. The courts will retain their discretion not to award costs where it is not in the interests of justice to do so.

Non-Parties

63. The Government wants to ensure that claims cannot be brought in a way that limits a person's proper cost exposure and circumvents the court's powers to make them liable for the defendant's costs where they lose. This might include a person who is not a formal party to a claim, but provides financial backing and advice to the 'named' claimant, or where potential claimants create companies, in both cases to evade the full financial risk from a claim. This behaviour by 'non-parties' might cost the taxpayer significant sums. The Government's view is that non-parties who are, in practice, driving litigation should have to face a more proportionate amount of the cost risk.

64. The consultation looked at whether the courts should be given greater powers to identify non-parties and ensure that they cannot avoid liability for the costs they should meet.

65. Having considered the responses, the Government is satisfied that the courts should have greater powers to identify non-parties in order to have the necessary information to make effective costs orders under their existing powers. The senior judiciary argued to this effect in their response to the consultation.

66. The Government will introduce primary legislation so that an applicant must provide information on funding at the outset of the judicial review, and requiring the courts to

have regard to this information in order to consider making costs orders against those who are not a party to the judicial review. This will allow the courts to make better use of the powers that they have. The Government recognises that it is not desirable for the changes to result in courts doing a forensic investigation into the information on funding and will make clear in legislation and court rules the extent of the information that is required to make sure an appropriate balance is struck.

The Proposals – Leapfrogging

67. Leapfrog appeals are cases which move direct from the court of first instance to the Supreme Court, missing the Court of Appeal. The current approach requires that a case involves a point of law that is of general public importance, and which either relates to statutory interpretation that has been fully argued or is one where the court of first instance would be bound by a superior court. Both the court of first instance and a Committee of the Supreme Court have to agree before a leapfrog can take place, and both parties must also give their consent.

68. The Government's view is that some cases which it is clear will not end in the Court of Appeal but will involve a further appeal to the Supreme Court should get there more quickly. Moving step by step through the court hierarchy can lead to lengthy delays, adding to costs and damaging public confidence in the effectiveness of the justice system. Therefore the consultation proposed three changes to the present arrangements to extend the potential for leapfrog appeals:

    i. allowing a case to leapfrog if it is of national importance or raises significant issues;

    ii. removing the requirement for all parties to consent; and

    iii. allowing leapfrog appeals to lie from decisions of the Upper Tribunal, Employment Appeals Tribunal and Special Immigration Appeals Commission.

69. These proposals would apply to leapfrog appeals in civil and administrative proceedings generally, not only to appeals in judicial reviews.

70. In general those who responded agreed with the principle that appropriate cases should be expedited to the Supreme Court, though some highlighted the risk that the Supreme Court could become overloaded and would lose the benefit of the Court of Appeal's consideration. In terms of the specific proposals, a majority was supportive of these changes, though some refinements were suggested. Specific concerns raised included that the extended criteria were too vague, that removing the need for consent would undermine appeal rights, and that leapfrogging should not be extended to SIAC.

71. Under the proposals the current role of the court of first instance and Supreme Court in agreeing to a leapfrog taking place would be retained, which would mitigate the potential risk of overloading the Supreme Court. This would also ensure that leapfrogging is only used in appropriate cases, addressing concerns that appeal rights could be undermined and that SIAC cases may not be suitable for leapfrogging. The Government considers that it is important to widen the criteria to allow certain high-profile cases to leapfrog and that sufficient clarity will be achieved through legislation and subsequent interpretation by the judiciary.

72. Therefore the Government is persuaded to make the three changes proposed in order to ensure that appropriate cases can be resolved more quickly, with fewer intermediate steps and at lower cost. Legislation is being brought forward to extend the criteria which must be met for a leapfrog to take place to include cases of national importance or which raise significant issues, remove the requirement for consent of both parties and allow a leapfrog to be initiated in the Upper Tribunal, EAT and SIAC.

Equality Impacts

73. As explained earlier, the Government intends to speed up planning cases and tackle the abuse of judicial review by those seeking to generate publicity or delay implementation of decisions that had been properly and lawfully taken, irrespective of by whom the judicial reviews are brought.

74. The consultation set out the Government's obligations under the Equality Act 2010, and specifically the requirement to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with and those without protected characteristics.[10] The Government sought, through the consultation, to gather further views and evidence on the potential equality impacts and has taken these into account in discharging its obligations under the 2010 Act.

75. It was argued by several respondents that, as the majority of judicial reviews relate to immigration and asylum cases, it was reasonable to assume that the proposals (with the exception of planning) had the potential to have a differential impact on the characteristics of race and religion/belief. The Government recognises that this may be the case but as the effects of the proposals will be felt only on weak cases it does not accept that the impact will be adverse or that the policy is wrong.

76. Some of the responses received, including ones from charities and NGOs, argued that certain reforms (such as on procedural defects) could have a disproportionately negative impact on groups with protected characteristics on the basis that those groups tend have more interaction with state services, and consequently have greater resort to judicial review. There is little centrally collected data on court users generally, and specifically about those who bring non-immigration and asylum judicial reviews, except that young people aged 18–25 bring disproportionately large numbers of claims. It is not possible to establish whether greater interaction with the state translates into more judicial reviews, and other factors may also affect this. Again, the Government would point to its aim being to tackle only weak cases and therefore it does not expect an adverse impact to be likely.

77. Specific concerns were raised by respondents over the proposals:

- for a Planning Chamber and a permission filter in appeals under section 288 of the Town and Country Planning Act 1990, which it was argued might affect Gypsy and Traveller communities disproportionately;
- on PCOs and interveners, which it was argued might cause fewer claims to be brought or arguments raised by or on behalf of individuals with protected characteristics;

[10] The protected characteristics are race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment.

- reform to other financial measures, which it was argued might disproportionately affect those in lower income groups who tend to have protected characteristics more often than other groups.

78. Equalities points were also made in relation to a possible change to the test for standing, which for the reasons set out in paragraphs 32 to 35 the Government has decided not to pursue.

79. Having had due regard to equalities issues, the Government's view is that it is justified in moving forward with the reform package set out in this document. The proposals will limit abuse and affect weak cases whether or not they are brought by those with protected characteristics, not strong cases (including those properly to be considered as in the public interest). The measures should speed up the consideration of these stronger cases by focusing scarce taxpayer funded court resources on them. In addition, reform such as the permission filter for section 288 challenges may save claimants, including those with protected characteristics, from the cost of preparing for a full hearing at which they may be unsuccessful. On balance, for the reasons given above and in relation to the specific proposals, the Government has concluded that the benefits of reform are sufficient to justify the potential impacts and, for these reasons, believes that its duties under the Equality Act 2010 have been fulfilled.

Next Steps

80. The Government is of the view that, where reform is to be taken forward, it is imperative that this is done quickly. Consequently, clauses to give effect to the following proposals are contained in the Criminal Justice and Courts Bill:

- changes to how the courts deal with procedural defects by amending the current test of 'inevitable' to ensure judicial reviews cannot proceed on the basis of minor 'technicalities';
- reducing the potential for delay to key projects and policies by extending the scope of leapfrogging appeals (which move direct from the court of first instance to the Supreme Court);
- strengthening the implications of receiving a Wasted Costs Order by placing a duty on the courts to consider notifying the relevant regulator and/or the Legal Aid Agency when one is made;
- setting out the circumstances in which a court can make a Protective Costs Order in non-environmental judicial reviews to ensure they are only used in exceptional cases;
- establishing a presumption that interveners in a judicial review will have to pay their own costs and any costs that they have caused to either party because of their intervention;
- introducing new requirements for all applicants for judicial review to provide information about how the judicial review is funded in the courts and Upper Tribunal.
- introducing a permission filter in challenges under section 288 of the Town and Country Planning Act 1990 (policy ownership of this provision lies with the Department of Communities and Local Government rather than the Ministry of Justice)

81. The Bill, and the accompanying documents which can be found on the Parliamentary website – http://www.parliament.uk/business/bills-and-legislation/ – set out the detailed form of the reforms.

82. The Government also intends to work with the Civil Procedure Rule Committee, the Tribunals Procedure Committee and the senior judiciary to urgently take forward:

    - the establishment of a new Planning Court; and
    - costs to be awarded more often at oral permission hearings.

83. We intend to introduce the proposal in relation to payment for legally aided judicial reviews in secondary legislation in spring 2014.

84. Consideration of the results of the consultation questions on the Public Sector Equality Duty as part of work to implement the recommendations of the Independent Steering Group will be taken forward by the Government Equalities Office.

85. The consultation also set out that the Government intends to review the rules on PCOs in environmental cases, to ensure that there is no gold-plating in how the Public Participation Directive has been implemented. This work will be done once we have the judgment of the European Court of Justice.

Statistical correction

86. The consultation paper drew from data published on 20 June 2013 as part of 'Court Statistics Quarterly January to March 2013'. This split judicial review data into the three categories of 'civil (immigration and asylum)', 'civil (other)', and 'criminal'. On 29 November 2013 the Ministry of Justice published a revision to these figures.[11] This re-allocated a small number of cases from the 'civil (immigration and asylum)' to the 'civil (other)' category. The 29 November 2013 statistical revision notice revised the figures in paragraph 10 of the consultation document and revised the chart on page 8 of the consultation document.

87. Following publication of this revision notice, updated statistics were published on 19 December 2013 as part of 'Court Statistics Quarterly July to September 2013'. These latest statistics show how the volume of judicial reviews has changed since 2000, broken down by the above three categories.[12]

[11] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262036/revision-judicial-review-figures-stats.pdf

[12] https://www.gov.uk/government/publications/court-statistics-quarterly-july-to-september-2013

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